



Federal Communications Commission
Washington, D.C. 20554

March 4, 2010

DA 10-369
In Reply Refer to:
1800B3-MW
Released: March 4, 2010

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**Re: KTXX-FM (formerly KXBT((FM)), Bee
Cave, TX
Facility ID No. 40762**

Application for Modification of Construction
Permit
File No. BMPH-20091014ABW

Informal Objection

Dear Counsel:

We have before us the application of BMP Austin License Company, L.P. ("BMP") for a minor modification of facilities (the "Application") for Station KTXX-FM,¹ Bee Cave, Texas (the "Station"). Cameron Broadcasting Company ("Cameron"), licensee of Station KMIL(FM), Cameron, Texas, filed an Informal Objection ("Objection") to the Application on November 10, 2009. For the reasons set forth below, we deny the Objection and grant the Application.

Background. On January 19, 2007, BMP filed an application seeking to relocate the Station from Dripping Springs, Texas, to Bee Cave, Texas.² At that time, the Station provided Dripping Spring's sole operational local broadcast service, and Educational Media Foundation held a construction permit for Station KLLR(FM), Dripping Springs, Texas.³ BMP contended in its Application that its proposal would not implicate the Commission's policy disfavoring elimination of a community's sole local broadcast service, as set forth in *Pacific Broadcasting of Missouri*,⁴ since KLLR(FM) was near completion and was

¹ The call sign of the station was changed from KXBT(FM) to KHHL(FM) on October 19, 2009, and again to KTXX-FM on November 2, 2009.

² File No. BPH-20070119AER (the "Bee Cave Application").

³ See File No. BMPED-20060517ACF. The modified construction permit was granted on July 21, 2006.

⁴ See *Pacific Broadcasting of Missouri*, LLC, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 10950 (2004) ("*Pacific Broadcasting*"). In *Pacific Broadcasting*, the Commission directed the Bureau to cease the practice of allowing the "backfill" of new allotments

about to go on the air. However, it included in its Application a waiver request to the extent that its proposal ran contrary to any Commission rules or policies. On February 28, 2007, KLLR(FM) filed a covering license application and requested program test authority.⁵

On March 1, 2007, Cameron filed a minor change application to change the community of license for its Station KMIL(FM) from Cameron, Texas, to Thrall, Texas, claiming that it was mutually exclusive with the Bee Cave Application.⁶ On March 13, 2007, Cameron filed an informal objection to the Bee Cave Application, asserting that BMP's reliance on the KLLR(FM) construction permit constituted an illegal "backfill" proposal that ran contrary to the Commission's holding in *Pacific Broadcasting*. The Media Bureau ("Bureau") dismissed the Informal Objection on May 21, 2007, concluding that KLLR(FM)'s commencement of service in Dripping Springs on February 28, 2007, rendered Cameron's argument moot, and it granted the Bee Cave Application.⁷ Cameron filed a Petition for Reconsideration of the *Staff Decision*, which the Bureau denied on September 15, 2008.⁸ On October 14, 2008, Cameron filed a timely Application for Review of the *Reconsideration Decision*, which remains pending.

On July 7, 2008, BMP filed an application⁹ to reduce the Station's maximum effective radiated power ("ERP"), increase its antenna radiation center height above average terrain ("HAAT"), and change the directional antenna pattern. Cameron filed an informal objection to that application, arguing that it should not be processed while Cameron's Petition for Reconsideration of the *Staff Decision* was pending. The Bureau dismissed the Objection because the *Reconsideration Decision* had been released and granted the 2008 Modification Application on October 8, 2008.¹⁰

On October 14, 2009, BMP filed the Application, proposing an additional increase in antenna radiation center height and additional changes in the directional antenna pattern.

In its Objection to the Application here, Cameron argues that "the submission of further proposed modifications to a construction permit which itself remains under challenge . . . may not be the best use

to prevent the removal of a community's sole local transmission service, holding that a vacant allotment is not an adequate substitute for the removal of a community's only operating radio station.

⁵ See File No. BLED-20070228ABJ. The staff granted this uncontested application and program test authority on March 30, 2007.

⁶ File No. BPH-20070301ABS. The application was dismissed on May 21, 2007.

⁷ Letter to BMP Austin License Company, L.P. from Rodolfo Bonacci, Assistant Chief, Audio Division, Ref. No. 1800B3 (MB May 21, 2007) ("*Staff Decision*").

⁸ Letter to Robert J. Buenzle, Esq. and Antoinette Cook Bush, Esq., 23 FCC Rcd 13468 MB 2008 ("*Reconsideration Decision*"). In its Petition for Reconsideration, Cameron argued again that the Application's reliance upon KLLR's issued construction permit to ensure continued service in Dripping Springs allegedly constituted an unacceptable "backfill" proposal. It argues that *Pacific Broadcasting* requires the Commission to reject such a proposal and that the Application was patently deficient and should have been dismissed. Cameron further claims that BMP engaged in "gamesmanship" by filing an allegedly defective application that effectively blocked consideration of any subsequently-filed applications under the Commission's "first-come/first-served" approach to requests to change the community of license of an existing FM radio station.

⁹ File No. BMPH-20080707ADE (the "2008 Modification Application").

¹⁰ Letter to Mr. Robert Buenzle (MB Oct. 8, 2008).

of Commission resources at this time,” and it requests that the Bureau withhold action on the Application until the full Commission acts on its Application for Review.¹¹

Discussion. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (“Act”),¹² provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act,¹³ which governs our evaluation of minor change applications. Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act.

Cameron requests that the Bureau withhold action on the Application until the full Commission acts on its Application for Review of KTXF-FM’s underlying construction permit. It is clear from the Commission’s Rules that actions taken under delegated authority are effective on release of the decision and that the filing of an Application for Review does not automatically stay the decision of which review is being sought.¹⁴ Clearly, action on the Application is subject to the Commission’s determination on Cameron’s Application for Review, and any decision by BMP to modify or construct KTXF-FM’s Bee Cave facilities are at its sole risk.¹⁵ Nevertheless, the grant of the Bee Cave Application is effective, if not final, and there is no basis for withholding action on the Application.¹⁶ We conclude that Cameron has not raised a substantial and material question of fact calling for further inquiry regarding the Application.

We have evaluated the Application, and we find that it complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity.

¹¹ Objection at 3. Cameron also indicates that, because its Application for Review has been pending for more than one year, “it is not unreasonable” to believe that the Commission will act on that pleading in “the very near future.”

¹² 47 U.S.C. § 309(e).

¹³ 47 U.S.C. § 309(a). *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁴ *See* 47 C.F.R. §1.102(b)(1) and (2). The Commission may, within 40 days of the release of public notice announcing an action by delegated authority, call for the record and set aside that action. *See* 47 C.F.R. § 1.117. It did not do so here, and Cameron did not seek a stay of the *Reconsideration Decision*.

¹⁵ *See, e.g., Letter to Dennis P. Corbett, Esq. and Katrina C. Gleber, Esq.*, 22 FCC Rcd. 4795, 4797-98 (MB 2007); and *Las Americas Communications, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1507, 1510 (1991) (an applicant opting to construct before the grant of its application becomes final does so at its own risk).

¹⁶ *See, e.g., Letter to Caswell Capital Partners et al.*, 24 FCC Rcd 14335 (MB 2009) (granting voluntary assignments from receiver to other parties while Application for Review pending against grant of previous assignment to receiver).

Conclusion. For the foregoing reasons, the Informal Objection filed by Cameron Broadcasting Company on November 10, 2009, IS DENIED, and the Application (File No. BMPH-20091014ABW) of MBP Austin License Company, LP, for minor modification of the facilities of Station KTXK-FM, Bee Cave, Texas, IS GRANTED. The authorization will follow under separate cover.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Antoinette Cook Bush, Esq.